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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

LUSK CONSTRUCTION COMPANY et al.,

Cross-complainants and Appellants,

v.

GALAXIE PLASTERING, INC.,

Cross-defendant and Respondent.

G033077

(Super. Ct. No. 715375)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David C. Velasquez, Judge. Affirmed.

Haight, Brown & Bonesteel, Stephen M. Caine, Howard, Loveder, Trickroth & Parker, Theodore Howard, and James E. Loveder for Plaintiffs and Appellants.

Law Offices of Kring & Chung, Kyle D. Kring, Carol L. Meedon, Brady, Vorwerck & Ryder, Richard G. Arneal, and Ravi Sudan for Defendant and Respondent.

* * *

Lusk Construction Company and the Lusk Company (collectively referred to as Lusk) appeal from the order disqualifying their expert witness and their counsel. The disqualification was based on access by the expert witness and counsel to the work product of an expert employed by Lusk's opponent in this litigation, Galaxie Plastering, Inc. Lusk argues (1) the privileges attached to the work product were waived and (2) the connection between its disqualified expert witness and counsel and Galaxie's expert is too attenuated to justify disqualification. We affirm.

FACTS

Sumitomo Realty & Development California, Inc. hired Lusk to supervise construction for Waterford Pointe, a residential real estate project in Dana Point. After the project was completed, the new homeowners complained of various construction defects, which Sumitomo repaired. Sumitomo filed a complaint against Lusk to recover the cost of the repairs, and Lusk filed a cross-complaint against its subcontractors for express and implied indemnity, declaratory relief, and negligence. The cross-complaint was dismissed in 1999 for failure to go to trial within five years. Lusk appealed the dismissal, and this court reversed and remanded the cross-complaint for trial in 2002. In the meantime, Sumitomo and Lusk settled the complaint, and Lusk subsequently either dismissed or settled many of its claims in the cross-complaint against the subcontractors. Galaxie is one of the two remaining cross-defendants.

In 1998, Galaxie designated Ted Bumgardner, a construction consultant employed by Gafcon, Inc., as its retained expert witness. Jeff Harris was also employed by Gafcon at that time as a senior cost estimator. While the case was on appeal, Harris left Gafcon and went to work at MC Consultants as a senior cost estimator. In April 2003, after the case was remanded, Galaxie again designated Bumgardner as its retained expert for the cost of repairs and other issues. Lusk's counsel, Senn Palumbo Meulemans, contacted MC Consultants for an expert. MC assigned Harris to Lusk's case, and Lusk designated Harris as its retained expert witness.

After Harris reviewed Bumgardner's 1998 deposition and papers he had prepared for the litigation, Harris remembered having worked on the cost of repair calculations with Bumgardner while he was employed by Gafcon. He contacted Senn Palumbo Meulemans and informed them of the conflict. MC Consultants chose Edward Martinet and Tom Blatchley to replace Harris, and Lusk filed a supplemental designation of expert witness removing Harris and replacing him with Martinet and Blatchley. Martinet was deposed in May 2003.

In June 2003, Galaxie moved to disqualify MC Consultants, including Martinet and Blatchley, and Senn Palumbo Meulemans. Bumgardner had reviewed Martinet's deposition transcript and the attached cost of repair analysis and determined that Harris had assisted Martinet in preparing Lusk's cost of repair. Bumgardner described Harris as his "right hand man" while they were both employed by Gafcon and stated that Harris was closely involved in the cost estimates for Galaxie. "Jeff was also involved and privy to discussions with counsel regarding trial strategy, use of testimony, and other exhibits for use at trial." Harris explained he could not remember any of the details of the work he did with Bumgardner or any of the claimed confidential communications with Galaxie's counsel.

The trial court granted the motion to disqualify Martinet and Senn Palumbo Meulemans, ruling that Harris' work for Galaxie was work product "and therefore confidential, because there was a reasonable expectation in the minds of defendants' counsel that the information would remain confidential." This raised a rebuttable presumption that the work product was communicated to the other experts at MC Consultants and to Senn Palumbo Meulemans. Lusk did not rebut the presumption because it failed to show that "the work prepared by Mr. Harris for the defendants will not be communicated to plaintiffs' counsel or witnesses or that Mr. Harris, or persons who may have received defendants' work product, will not have any involvement in the litigation."

Lusk sought reconsideration, which was denied. It then filed a petition for writ of mandate with this court, seeking a stay of the trial and review of the disqualification order. The petition was summarily denied because an appeal was an adequate remedy at law. Lusk filed a notice of appeal but abandoned the appeal after it decided to retain replacement counsel, Howard, Moss, Loveder, Strickroth & Parker (the Howard firm), and designate a new cost of repair expert, Scott Dinslage.

Dinslage was deposed as Lusk's expert in August 2003. During testimony, he revealed he had reviewed documents on a compact disk from MC Consultants that was an exhibit to Martinet's deposition.[1] Dinslage testified there was a cost of repair estimate on the disk, but he did not review it. "[I]t was printed, and before I looked at it, Mr. Howard and I had this conversation regarding the disqualification of the cost estimator, or someone involved with that cost estimate, and we threw it away." But Dinslage did review a lengthy report from MC Consultants entitled "Defect Issue Report" and most of the other documents on the disk. He was told not to look at the cost estimate, but "[o]ther than that, [he] could look at the documents."

Galaxie moved to disqualify Dinslage and the Howard firm because Dinslage used work product from Lusk's previously disqualified counsel to form his expert opinions and the Howard firm had access to MC Consultant documents. Galaxie attached copies of documents created by MC Consultants that Dinslage reviewed and included in his "Primary Project Date" binder: the Defect Issue Report, List of Players, Sumitomo Quantities Matrix, and the Window/SGD Count Summary.

In opposition to the motion, Lusk submitted a declaration from Dinslage. Dinslage stated the items he reviewed from the disk "provided me only background material and in no way formed the basis of any of the opinions I am prepared to give at the trial of this matter." He reviewed a "window and sliding glass door count summary"

[1] The compact disk was entitled Sumitomo v. Lusk Trial Exhibits and was clearly labeled with MC Consultants' logo and contact information.

from the disk "simply to provide me with a general idea of the number of windows and sliding glass doors found in the 169 single family residential units . . . . Such information can also be obtained independent of this count . . . ." He also reviewed the Defect Issue Report, which was a "summary of the plaintiff Sumitomo's position concerning the claimed defects." But he declared that his opinions "on these matters" were based "wholly" on his review of subsequently obtained documents from the Sumitomo files. He also reviewed the Scope of Work Analysis containing MC Consultants' review of contract and billing documents of the subcontractors, including Galaxie. Again, he declared his "opinions in regard to their scope of work are based not on that document but rather my own review of the Subcontract Agreements and other documents which were obtained from sources other than MC2 consultants." Finally, he reviewed the Window Test Matrix prepared by MC Consultants, but declared it played "no role in any of the opinions I am prepared to express in this matter." Furthermore, "all such information is available from the voluminous documentation and depositions taken in this matter . . . ."

Ted Howard, of the Howard firm, declared he was "not aware of any order of this court that any of the work product of the disqualified experts a MC2 Consultants was to be kept out of the hands of this law firm or its newly designated expert." He saw the compact disk "but was not aware of its contents or origin" when his office delivered it, along with other disks and many boxes of documents to Dinslage. At some point before his deposition, Dinslage told Howard he had reviewed some documents from MC Consultants, but not the cost of repair document. Howard asked Dinslage if any of the MC Consultants materials would form the basis for his trial opinions; Dinslage said no, they "were only of informational value." Howard also confirmed with Dinslage that all the information in the MC Consultants materials was available from independent sources. The only MC Consultants document Howard read was the window/sliding glass door count.

Marisa Castagnet, the attorney responsible for the Lusk case when it was represented by Senn, Palumbo, Meulemans, declared she understood "all litigation documentation should be screened for confidential information" before it was provided to the replacement expert and counsel. She supervised the review and transfer of the files and "removed certain potentially confidential items . . . ." When the documents were physically removed from her office, she was not present; her staff "inadvertently included . . . one thin compact disc entitled Sumitomo v. Lusk Trial Exhibits L00039-L00049, which unbeknownst to my staff contained documents generated by MC Consultants, Inc. This was not my intent. I was surprised and shocked to learn that the compact disc had been forwarded to the new attorneys and in turn to the new expert."

The trial court found, "In the instant motion, the question is whether cross-complainant's present counsel or experts acquired the same protected information [that was the subject of the previous motion]. [¶] Whether the disclosure of information was inadvertent or unintentional is not material to the resolution of this motion. [Galaxie] has presented sufficient evidence that during the time Mr. Bumgardner was retained as an expert for Galaxie Plastering and Sunset Tile he participated in confidential discussions with their counsel on matters unrelated to the opinions for which he was designated to give at trial. Such information was made available to Mr. Harris while assisting Mr. Bumgardner in the preparation of the cost of repair estimate. Mr. Harris, while employed at Gafcon, performed analyses, reviewed documents and prepared documentation for Galaxie Plastering and Sunset Tile. Counsel for Galaxie Plastering and Sunset Tile never were advised that Mr. Harris was working for MC2 and counsel for Lusk never asked for a waiver of any conflict. . . . Mr. Dinslage admits he reviewed some of the information on the CD produced by MC2, including the 78 page Defect Issue Report, containing an analysis of each defect, based in part on sources of MC2's information derived from Mr. Harris."

DISCUSSION

Lusk contends any privileges attached to the documents reviewed by Dinslage were waived when Galaxie named Bumgardner as its retained expert witness and then produced him for deposition. (*National Steel Products Co. v. Superior Court* (1985) 164 Cal.App.3d 476, 484.) Because Harris was Bumgardner's agent, Lusk continues, any waiver of privileges as to Bumgardner would operate as a waiver of privileges attaching to Harris' work. Lusk's reasoning is flawed for two reasons.

First, the work that the trial court found to be confidential at the first disqualification hearing was not Bumgardner's work; it was the information Harris gleaned from working with Bumgardner on behalf of Galaxie which he took with him when he went to work for MC Consultants, where Martinet and Blatchley were working as experts on behalf of Lusk. Galaxie never waived any privilege as to Harris. Second, Lusk made a vigorous argument for the waiver issue at the first disqualification hearing and lost. An order disqualifying an attorney is immediately appealable. (*State Water Resources Control Board v. Superior Court* (2002) 97 Cal.App.4th 907, 913.) While Lusk initially sought appellate review of the order, it ultimately abandoned the appeal. Thus, the order is final and Lusk cannot attack its correctness in the appeal from the second disqualification order.

Lusk next contends the second disqualification order was an abuse of the trial court's discretion because there is insufficient evidence to support the finding that confidential material was communicated to Dinslage. We review a trial court's decision on a disqualification motion for an abuse of discretion, deferring to its factual findings if they are based on substantial evidence. But the trial court's discretion is limited "by the applicable legal principles," and its decision will be reversed if there is no reasonable basis for it. (*The People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1143-1144; *In re Complex Asbestos Litigation v. Owens-Corning Fiberglas Corporation* (1991) 232 Cal.App.3d 572, 585.)

The first step in the analysis of a disqualification motion such as the one before us is to determine whether the information received by Dinslage was actually confidential. (*Toyota Motor Sales, U.S.A., Inc. v. Superior Court* (1996) 46 Cal.App.4th 778, 782.) The attorney-client privilege protects confidential information the attorney has received from his or her client, which is then transmitted to an expert. When the expert is designated as a witness, however, the attorney-client privilege is lost "because the decision to use the expert as a witness manifests the client's consent to disclosure of the information." (*Shadow Traffic Network v. Superior Court* (1994) 24 Cal.App.4th 1067, 1078-1079.) If an expert is retained as a consultant, any reports prepared by him or her are protected by the work-product doctrine. Upon the expert's designation as a witness, the reports are discoverable. "However, to the extent that said reports embrace counsel's impressions and conclusions, the work-product doctrine gives absolute protection to that information." (*Id.* at p. 1079.)

In *Shadow Traffic*, the defendant's attorneys, Latham and Watkins, retained Deloitte & Touche as an expert notwithstanding it had been previously interviewed by the plaintiff's attorneys, Andrews & Kurth, as potential experts for the same lawsuit. During the interview, confidential information was transmitted to Deloitte & Touche; it was advised of its confidential nature, but was not retained. Deloitte & Touch informed Latham & Watkins of the previous interview, but they hired the firm anyway and did not inform Andrews & Kurth about the potential conflict.

The court held that once the party moving for disqualification had established that its attorney transmitted confidential information to the potential expert, "a rebuttable presumption arises that the information has been used or disclosed in the current employment. The presumption is a rule by necessity because the party seeking disqualification will be at a loss to prove what is known by the adversary's attorneys and legal staff." (*Shadow Traffic Network v. Superior Court*, *supra*, 24 Cal.App.4th at p. 1085, citing *In re Complex Asbestos Litigation*, *supra*, 232 Cal.App.3d at p. 596.)

"The effect of this type of presumption 'is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact.' [Citation.] This means that because the trial court had first found the basic fact that gave rise to the presumption (Andrews & Kurth had given confidential information to Deloitte & Touche), it had to find the presumed fact (Deloitte & Touche had disclosed this confidential information to Latham & Watkins) unless it was persuaded by a preponderance of the evidence of the nonexistence of the presumed fact." (*Ibid.*)

Using the analysis in *Shadow Traffic*, the trial court found in the first ruling that Harris' information was protected by the work-product privilege and therefore confidential. It disqualified Martinet and Senn Palumbo because it found Harris' information had been presumably transmitted to Martinet and the other employees at MC Consultants and thus to Senn Palumbo. In other words, it found Martinet's work had been infected by Harris' confidential information.

Given the determination of the trial court in its first ruling, it follows that Dinslage's exposure to Martinet's work exposed him to confidential information. Dinslage admittedly reviewed some of Martinet's work, including the defect issue report that contained analyses.[2] The trial court had the report and the other documents Dinslage admittedly reviewed before it for consideration when ruling on the motion. This provides sufficient evidence to uphold the trial court's conclusion that Dinslage was exposed to confidential information.

As set forth in *Shadow Traffic*, the exposure to confidential information raises a presumption that the "information has been used or disclosed in the current employment." (*Shadow Traffic Network v. Superior Court*, *supra*, 24 Cal.App.4th at p. 1085.) In the context of this case, this means there is a presumption that the

[2] For example, the MC Consultants' analysis of the canopy windows leak was: "Plaster voids were noted next to the frame at the angled rake locations, (plan type 3) exposing the building paper to moisture at the top of the jamb to wall junction. In addition the roof edge flashing corners have gaps leading to water intrusion."

information was used by or disclosed to Dinslage and the Howard firm. Lusk argues the presumption is rebutted because Dinslage denied relying on any of the documents prepared by MC Consultants other than the window and door count. But given the admitted exposure to the confidential information, the trial court was permitted to infer it may have influenced Dinslage. Dinslage's denials were not necessarily sufficient to rebut the presumption.

Lusk argues there could not have been any transmittal of confidential information because neither Harris nor Bumgardner had any direct contact with Dinslage. We reiterate it is not Bumgardner's information with which the trial court was concerned; it is the information Harris gleaned from working with Bumgardner that has been improperly transmitted. Galaxie need not prove an explicit disclosure of information from Harris to Dinslage. Dinslage could still have obtained the benefit of the information because the information could have consciously or unconsciously shaped or affected the analysis Harris and Martinet gave to Lusk. (*Shadow Traffic Network v. Superior Court*, *supra*, 24 Cal.App.4th at p. 1086.)

Lusk claims the trial court impermissibly engaged in a lengthy chain of imputation, citing this court's opinion in *Frazier v. Superior Court* (2002) 97 Cal.App.4th 23. In *Frazier*, the plaintiffs consulted George Genzmer, a partner in the Los Angeles office of Murchison & Cumming, about possible representation in their civil action against the defendant. The plaintiffs retained another attorney, who filed suit. The defendant's insurer, ignorant of the plaintiff's contact with Genzmer, hired Dan Longo, an attorney in the Santa Ana office of Murchison & Cumming, to represent its interests. The insurer also appointed Joseph Hartley, of Hartley & Hartley, to act as the defendant's independent counsel.

At the time of his appointment, Hartley was unavailable to attend a few scheduled depositions, so Longo agreed to cover them for Hartley. One month later, Longo told Hartley he had just learned about the plaintiffs' contact with Genzmer, and

Murchison & Cumming had withdrawn from representing the insurer. The plaintiffs filed a motion to disqualify Hartley, and the trial court granted it, finding that "once Murchison & Cumming undertook depositions on behalf of Hartley & Hartley, the two firms were engaged in the joint defense of [the defendant]." (*Frazier v. Superior Court*, *supra*, 97 Cal.App.4th at p. 28.) Thus, Hartley was presumed to have access to the confidential information plaintiffs had disclosed to Murchison & Cumming. (*Id.* at p. 29.)

On appeal, the court reversed the order granting disqualification, finding the relationship was too attenuated to justify disqualification. "[Plaintiffs] ask this court to impute Genzmer's knowledge first to Longo, and second from Longo to a different law firm entirely. This is just because Longo, the insurer's counsel who had every right to attend the deposition on behalf of the insurer . . . agreed to cover the depositions for the insured's counsel." (*Frazier v. Superior Court*, *supra*, 97 Cal.App.4th at p. 31.) Longo declared he knew nothing about the conversation between Genzmer and the plaintiffs, and both he and Hartley declared they had not had time to discuss anything of substance on the case, let along Genzmer's involvement. The plaintiffs offered no evidence that there was any actual communication of confidential information between Genzmer and Longo or Hartley. The court concluded, "There is simply no demonstrated reason to double impute the knowledge of confidential information from Genzmer to Longo and then from Longo to a separate law firm altogether." (*Id.* at p. 32, 37.)

In the case before us, there is no double imputation. It was Martinet's work that the trial court found to be contaminated by Harris' information, and Dinslage was directly exposed to Martinet's work. Unlike *Frazier*, it is not an automatic disqualification based on joint representation.

Collins v. State of California (2004) 121 Cal.App.4th 1112, filed since the parties completed briefing, does not compel a different result. There, Collins was injured in a truck accident and sued the truck manufacturer, Navistar. In August 1999, Navistar's counsel hired Clark as an expert consultant and candidly discussed the case with him.

Counsel provided Clark with the police report and nothing else. The two had no more contact until June 2002. In the meantime, in September 2000, Collins hired Clark as an expert witness. When Collins filed his designation of experts in June 2002, Navistar's counsel contacted Clark. Clark then called Collins' counsel and said he had completely forgotten that he had been retained by "an attorney from Los Angeles" who represented the defendant. Collins' counsel told Clark they could have no further contact until the situation was "sorted out." (*Id.* at p. 1119.)

The trial court granted Navistar's motion to disqualify Collins' counsel, but the appellate court reversed. The court concluded that the rebuttable presumption created by *Shadow Traffic* did not apply because Clark remained the consultant to Navistar. Thus, the rationale for the presumption – "that the party seeking disqualification will be at a loss to prove what is known by the adversary's attorneys and legal staff" (*Shadow Traffic Network v. Superior Court*, *supra*, 24 Cal.App.4th at p. 1085) – did not apply. Navistar had access to Clark but submitted nothing to suggest that Clark had disclosed any confidential information to Collins' counsel. The court's conclusion was bolstered by the fact that Collins' counsel acted ethically as soon as he found out about the conflict and cut off all contact with Clark.

Here, the disclosure of confidential information was a foregone conclusion due to the trial court's ruling on the first disqualification motion. Given that predicate, we cannot say the trial court abused its discretion in protecting the confidential information from further disclosure.

DISPOSITION

The disqualification of Dinslage and the Howard firm is affirmed. Galaxie is entitled to costs on appeal.

SILLS, P. J.

WE CONCUR:

RYLAARSDAM, J.

BEDSWORTH, J.